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ABSTRACT

This document discusses the issues and regulations that affect schools, school districts, and state education agencies in the release of personal information on their employees. It is not intended to provide legal guidelines, but rather to introduce the key concepts involved in protecting and managing information in staff records. By understanding the privacy issues surrounding staff records, agency or school officials may develop policies and procedures to protect employee privacy without conflicting with the public's need to know and its right to have access to government records. The text is divided into four chapters. Following an overview, chapter 2 discusses open government versus personal privacy. It presents guidelines that address trustee of records, public agency, public records, personnel files, personal privacy interests, and clearly unwarranted invasion of personal privacy. Chapter 3 examines access to and release of staff records and describes guidelines on providing internal access and use, managing the release outside an agency, evaluating a request, and documenting requests and release. The final chapter discusses the collection and maintenance of staff records and presents guidelines on types of data to collect, data maintenance, collecting and using unique identifiers, adding new information to records, licensure and certification data, and the disposal of data. (Contains a glossary.) (RJM)

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PRIVACY ISSUES
In Education Staff Records

Guidelines for Education Agencies

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PRIVACY ISSUES
In Education Staff Records

Guidelines for Education Agencies

Oona Cheung
Council of Chief State School Officers

Data Confidentiality Task Force
National Forum on Education Statistics

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CHAPTER 1

Overview

Schools, school districts, and state education agencies maintain a large volume of personnel files. A lot of personal information is kept in these records, including personal identifiers such as social security numbers; demographic information; salary; benefits; residence; dependents; education; employment history; medical history; evaluations; assignments; and, occasionally, even background check results. Under certain circumstances, personnel files and/or the information they contain may be requested by, and released to, parties other than the individual concerned.

This document discusses the issues related to releasing these records and their contents. It is not intended to provide legal guidelines, but rather to introduce the key concepts involved in protecting and managing information in staff records. With an understanding of the privacy issues surrounding staff records, agency or school officials may develop policies and procedures to protect employee privacy without conflicting with the public's need to know and its right to have access to government records. Other possible users include personnel from school boards, intermediate education units, professional associations, and researchers.

This document discusses the issues related to releasing the information in these records. It is not intended to provide legal guidelines, but rather to introduce the key concepts involved in protecting and managing information in staff records.

Unlike the information in student records, which belongs to the students and their parents, many parts of staff records maintained by state and local education agencies are considered "public records." Although they are entrusted to the agency for use and management, these records are governed by each state's open records law or Freedom of Information Act (FOIA). If you are used to working with student records, you will find that there are fewer restrictions, and a lot less guidance, involving staff records. The laws generally permit the public to inspect government records upon request, with some specific exceptions and exemptions that vary by state.

State laws differ greatly in what and how public records are to be maintained and released. In addition, each state has its own exceptions, definitions, and practices. The issues discussed in this guide should therefore be addressed within the context of the laws in your state that govern the maintenance and release of public records. These are usually found in the state's open records law or FOIA. In some states, other laws and regulations may restrict the disclosure of certain informa-

Each state has its own exceptions, definitions, and practices. The issues discussed in this guide should be addressed within the context of the laws in your state that govern the maintenance and release of public records.

tion, such as licensure records. State libel and defamation laws may also have implications for releasing public records.

State and local education agency staff should be familiar with the specific state laws and regulations. Ask your agency's legal office for current copies of relevant state laws and regulations, as well as information about applicable case laws. Additional information may be available from the state Attorney General's office, state licensure and certification authorities, the human resources office, the school board, and FOIA officials.

Ask your agency's legal office for current copies of relevant state laws and regulations, as well as information about applicable case laws.

Other Resources

This publication was developed by the Data Confidentiality Task Force of the National Forum on Education Statistics. The Forum is a cooperative system combining the resources of federal, state, and local education agency personnel to improve the availability, quality, comparability, timeliness, and usefulness of education data. Since November 1994, the Task Force has directed multiple efforts to clarify the issues surrounding the maintenance of confidentiality of student and school staff data. A brochure, *Protecting the Privacy of Student Education Records*[1], was developed to promote the public understanding of the Family Educational Rights and Privacy Act (FERPA), a federal law that gives parents the right to review and confirm the accuracy of education records while restricting the records' improper release. A companion document, *Protecting the Privacy of Student Records: Guidelines for Education Agencies*[2], assists state and local education agency staff with the development of policies and procedures to protect information about students and their families from improper release, while satisfying the need for school officials to make sound management, instructional, and service decisions. Although the *Guidelines* focuses on student records, it explains some important privacy terms and concepts that are applicable to staff records, and should therefore be considered a useful companion to this document. In addition, the Forum publication called *Safeguarding Your Technology: Practical Guidelines for Electronic Education Information Security*[3] was developed to help administrators and staff at the school, district, and state levels gain a better understanding of how to effectively protect sensitive electronic information, critical systems, and computer equipment.

Ordering and downloading information is included in the Notes section at the end of the document. (p. 22)

CHAPTER 2

Open Government versus Personal Privacy

Overview

This chapter briefly describes the scope of existing federal laws that discuss privacy and public records. It also outlines the common characteristics of states' open records laws and privacy laws. It lists examples and explains such important terms as trustee of the records, public agency, public record, personnel file, personal privacy interest, and clearly unwarranted invasion of personal privacy. Agency or school staff should be familiar with these concepts before making decisions about releasing staff records.

Information and concepts presented in this chapter are taken primarily from a legal memorandum published by the National Association of Secondary School Principals (NASSP) in May 1989[4]. This eight-page document analyzes how agency or school officials should balance the public's right to know with an individual's right to privacy. It also includes examples of case law exemptions that have been allowed in state courts.

Federal Laws

Federal law does not protect the privacy of staff records as it does student records. However, the federal Freedom of Information Act (FOIA), 5 U.S.C. sec. 552 (1966, rev. 1976); and the Privacy Act, U.S.C. sec. 552a (1976) govern the records maintained by *federal* agencies. It is important to note that state FOIA or privacy laws may not include the same exemptions as the federal statutes.

The federal Freedom of Information Act and the Privacy Act govern the records maintained by *federal* agencies. It is important to note that state FOIA or privacy laws may not include the same exemptions as the federal statutes.

The Federal Freedom of Information Act

The Freedom of Information Act helps Americans obtain information about the actions of the federal government. It requires that citizens be given access to federal records unless disclosure involves:

- Litigation
- The Central Intelligence Agency
- Internal agency memoranda
- Personnel matters
- Trade secrets
- Classified documents
- Law enforcement activities

- Confidential government sources
- Violating an individual's privacy interests
- Civil service examinations (to the extent that access would affect the tests' fairness)

If an agency denies a request for information, the requester must be told why within 10 days. The requester may appeal, either within the agency itself or in court.

The Federal Privacy Act

The Privacy Act gives individual Americans the right to see and copy files that the federal government maintains on them, find out who else has had access to the information, and request a change in any information that is not accurate or relevant. However, access may be denied if the records involve:

- Law enforcement activities
- The Central Intelligence Agency
- Litigation
- Civil service examinations (to the extent that access would affect the fairness of the tests)
- Confidential government sources

In addition, the law allows federal files to be opened to others in a few cases, including:

- A purpose similar to the original reason for collecting the information
- For statistical research
- For law enforcement purposes
- When ordered by a court
- If it is medically necessary for the requester to have access to the information

The Privacy Act requires federal agencies to:

- Respond to a request for information within 10 days
- Notify the public about the types of files maintained via the *Federal Register*
- Let the public know how the information is used
- Make sure the information in the files is relevant
- Use the information only for the purpose(s) for which it was initially collected

The federal Privacy Act also prohibits government agencies from collecting and using social security numbers (SSN), except as authorized by federal law or by disclosure practices adopted at the federal, state, or local level prior to 1975.

Individuals may appeal in court if access is denied.

Guidelines

The public's right to know what information is maintained by the government is legislated by federal and state FOIA or open records laws. Records of school staff, who are employees of a publicly funded agency, are generally "open records" unless they are considered "confidential" or exempted from release by state laws or local policies. However, access has generally been restricted in personnel matters involving medical records, certain inter- or intra-agency memoranda, materials deemed drafts and notes (prior to a final decision), and matters reasonably contemplated to be litigated. Information can also be restricted if its disclosure would constitute an "invasion of personal privacy." In other situations, information may be released or disclosed for a staff member's personal safety concerns. School administrators need both a knowledge of specific statutes that govern their school districts and an understanding of the principles undergirding the applicable public records and privacy laws. Case law on personnel file issues may also be relevant, and school administrators should research and keep on file any applicable state statute and case law to guide them in disclosure decisions.

Records of school staff, who are employees of a publicly funded agency, are generally "open records" unless they are considered "confidential" or exempted from release by state laws or local policies.

Understanding the following concepts will help in disclosure decisions. Additional terms are defined in the Glossary at the end of this document.

Additional terms are defined in the Glossary at the end of this document (p.21).

A. Trustee of the Records

A philosophical cornerstone in maintaining public records is the concept that the actual records belong to the public. Agency or school officials are only the public's "trustees of the records." Agency or school officials are entrusted by the public to manage and use these information resources wisely, as they do in managing and using public funds. (This contrasts with student records, where the information belongs to the students and their parents.) This concept of "trusteeship" has historically led public records officials and state courts to disclose the information in staff records when requested. However, depending on the particular case, the courts may agree to grant an exemption and disclose a particular document or portion of a document.

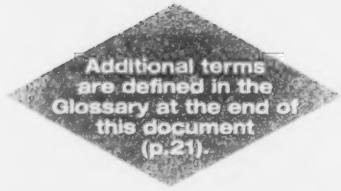
Agency or school officials are entrusted by the public to manage and use these information resources wisely, as they do in managing and using public funds.

B. Public Agency

Public schools are funded by a combination of federal, state, and local funds. They are therefore considered public agencies in all states and typically governed by state statutes. Personnel records in private schools are governed by common law rules, such as libel or defamation laws. Federal and state statutes may apply to private organizations that are closely aligned to a public agency. For example, if a private organiza-

It is the *nature* and *purpose* of the record that determine its status, not the place where it is kept.

It is important to analyze the specific information being requested, because it is not how the records are labeled, but rather their actual content that will determine disclosure or exemption.



The privacy interest must be substantial, not just a mere possibility.

tion has a contractual agreement with a public agency to perform specific tasks; documents related to these tasks may be considered "public records."

C. Public Record

State statutes generally specify what is considered a "public record." Some states define it as any record "required" by law. Other states have broader definitions that may cover all records "kept" or "used" by a public agency. Some states include in their definitions those records that are of preliminary and pre-decisional nature, as well as those in final form. In addition to statutory laws, case law has also defined "public records." In other words, it is the *nature* and *purpose* of the record that determine its status, not the place where it is kept. For example, documents produced and maintained by a private consultant might be considered a public record if the consultant was hired by a school district to identify a candidate.

D. Personnel File

The federal FOIA contains disclosure exemptions that include "personnel" and "medical" files. Also exempted are files with information that, if disclosed, would constitute a "clearly unwarranted invasion of personal privacy" (see below). However, not all personnel files are exempted from release, and state statutes may not consider an entire personnel file exempted. It is important to analyze the specific information being requested, because it is not how the records are labeled, but rather their actual content that will determine disclosure or exemption.

A variety of personal information is kept in a "personnel file," especially once an individual is employed. These files usually include records obtained elsewhere, such as college transcripts or employment recommendations; as well as records generated within the agency, such as filed grievances or payroll information. In addition, a personnel file may have "segments," which may be kept at different locations and for a variety of purposes. These segments might include a licensure or certification file, retirement information file, employment record, evaluations records, or possible law enforcement information.

E. Personal Privacy Interest

There is a "personal privacy interest" if disclosing the requested information would harm an individual by embarrassment, loss of reputation, or loss of employment. "Personal" here refers to the individual about whom the information is requested, not a third person, department, or institution. The privacy interest must be substantial, not just a mere possibili-

ty. However, proving that personal privacy interest exists does not in itself warrant an exemption from disclosure. It simply means that the individual has a valid concern that must be weighed against the benefits of public disclosure.

Some state courts have exempted as "personal" any information that is subjective or evaluative in nature. In Massachusetts, for example, student evaluations of teachers are considered "personal" and exempt from disclosure.

F. Clearly Unwarranted Invasion of Personal Privacy

The records may be exempted from release if an ordinary person would agree that releasing the information would constitute an "invasion of personal privacy," and that such harm would be "clearly unwarranted." The following factors should be considered:

- The individual's interest in restricting disclosure
- The public's interest in disclosure
- The degree of invasion of personal privacy
- The availability of any alternative means of obtaining the requested information

The records may be exempted from release if an ordinary person would agree that releasing the information would constitute an "invasion of personal privacy," and that such harm would be "clearly unwarranted."

In a Michigan case, for example, the names and salaries of public employees were ordered by the court to be released to a private party. The state argued that releasing the information would create "ill will, hard feelings, and prejudice" among the employees, but the court found that the minor invasion of privacy resulting from disclosure was outweighed by the public's right to know precisely how its tax dollars were spent.

In another case, in Massachusetts, the media requested the names of candidates for a school district superintendent's position. The court ruled that disclosure could be considered an "invasion of privacy" on an applicant-by-applicant basis. A name could be exempted if evidence showed that disclosure would adversely affect that applicant's current position, standing in the community, or attempts to find future employment. However, not all names could be exempted from disclosure just because some could be withheld.

Additional terms are defined in the glossary at the end of this document (p.21).

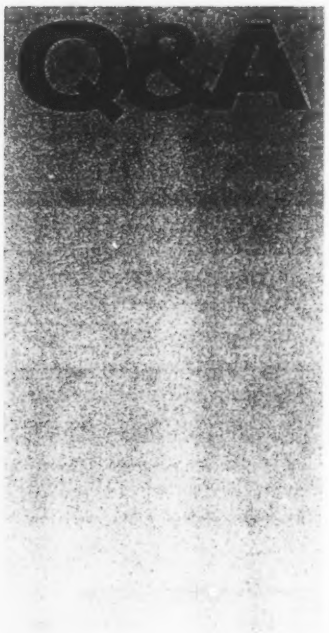
In Pennsylvania, a court ordered the disclosure of teacher attendance records. The court held that the fact of illnesses or family death would not affect personal reputation or security. The court also noted that school districts should keep such records separate from others with sensitive information that could be found exempt from disclosure.

CHAPTER 3

Access to and Release of Staff Records

Overview

This chapter covers the procedures for analyzing the nature of the data, in order to determine what information should be disclosed upon request. It lists state examples of exemption and non-exemption, and uses the NASSP guidelines.



Commonly Asked Questions

Q. If colleges want detailed information about their graduates who are now teaching, what can be released?

A. You can release the information to the extent required or allowed by your state laws and local policies. Also check the school board rules for any specifics about releasing teacher evaluation information. For example, the fact that a teacher has not been certified may be public information, but the reasons may be confidential. In many states, teacher evaluation records are considered confidential and can only be released to the evaluated individual, the board of education, the administrative staff making the evaluation, and the board/administrative staff of a school to which the teacher has applied for employment.

Q. Can staff members request non-disclosure for their own personnel files?

A. An employment application form may include this question: "Do you object to the release of information related to this application, or the fact of your application, to anyone other than submitted references?" Make sure to ask for the reason. Your state may allow prospective applicants to request non-disclosure of their application because it may adversely affect their community standing or their present or future employment. However, once an individual is employed by the agency, state FOIA and privacy acts govern the records disclosure. Therefore, it is important that applicants understand these rules and accept them prior to employment by a public agency.

Q. When information is requested, must you notify the employee concerned?

A. Your state laws and statutes or your state/school board

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policies may or may not require you to notify the employee whose information has been requested and/or disclosed. It is, however, a good practice to keep a log of all requests and disclosures.

Q. Who has the right to the information in a file when a complaint has been filed against an employee?

A. The answer will depend on whether or not the type of information in the file is regulated, and the potential effects of disclosure on the individual. To avoid last minute decisions, an agency or school should establish proper procedures for handling different types of complaints or grievances, including who should be responsible, who should be notified, how the investigation should be handled, and how the information about the investigation should be maintained.

Q. Do I have to respond to every inquiry? Is there a penalty for not doing so?

A. Your state FOIA or open records laws should have general requirements or guidance regarding how the public may request access to public records. However, many states designate a records official to deal with such requests and related issues. If so, you may need to refer the requester to the appropriate office. Penalties for not complying with the state FOIA or open records law may vary.

Q. Can we distinguish between valid research projects and those that are just a burden?

A. If the records are public, burden is generally not an issue as considered in courts. Court decisions are generally not based on burden, but rather on balancing the public's right to know against personal privacy interests.

Q. What do I do when a law enforcement agent asks for staff information?

A. If the release is allowable by your state's public safety law and the request is authenticated, you must release the information.

Q. Does a subpoena require turning over the entire file?

A. A subpoena usually states what specific information is required. Unless the entire file is subpoenaed, you may not need to turn it over.

Q. Am I liable if I disclose something I shouldn't or withhold information I should release? Am I liable for accuracy if I didn't collect the data?

A. Check your state's privacy laws regarding the penalty (including any personal liability) for releasing confidential

Q&A

records, and the open records laws for refusing to release public records. If you did not collect the data but maintain its integrity in good faith, you generally are not liable for inaccuracies.

Q. To what extent can a state or local administrator restrict access to, or release of, staff records?

A. State or local administrators may restrict access to, or release of, staff records as permitted by their state laws and statutes. State or school board rules may also have policies regarding this issue. However, even with public records, the administrator has an ethical responsibility to protect the records' integrity and allow access only for legitimate purposes. Specific guidelines for protecting the records system may be found in *Safeguarding Your Technology: Practical Guidelines for Electronic Education Information Security.*

Q. Which school officials have rights to records? What rights do local board members have?

A. School officials and local board members have the same rights to the records as the public. Additional rules may be established by the board to allow access by school officials or local board members if necessary to carry out their responsibilities.

Q. Who determines the format of the information released, i.e., as a paper or electronic file?

A. Your state FOIA or open records law and statutes, or the records official, should have policies and procedures regarding this area.

Q. What is the process for requesting information? Should there be a protocol?

A. Your state FOIA or open records law and statutes, or the records official, should have the policies and procedures regarding this area.

Q. How do I conduct meetings in which personal information is to be discussed?

A. School board rules usually state what types of meeting should be considered open to the public and which may be closed. These rules should also state what types of personnel information may be discussed in public. At the state level, the open government laws govern how these meetings are conducted.

Q. If I deny access to a file, must I provide a reason?

A. Generally, you have to provide a reason for denying access to a file that is considered a public record. Legitimate reasons may include: the record is restricted by law, or releasing the

information will clearly cause an unwarranted invasion of personal privacy.

Q. Can staff records be transmitted electronically, via FAX or Internet?

A. Even when release of the staff records is approved, you still have an ethical responsibility to protect the records until they reach the individuals who requested them. Transmitting information electronically may or may not be safe, depending on how you secure the means of transmission. For specific guidelines in this area, see *Safeguarding Your Technology: Practical Guidelines for Electronic Education Information Security*.

Q. When a complaint is made, are we obligated to inform the SEA or LEA staff in question?

A. The procedure for investigating a complaint is usually determined by state or school board rules. This may include how the complaint is to be handled, and whether the employee involved should be informed.

Guidelines

A. Providing Internal Access and Use

Staff members should have access to their own records to verify the accuracy of the information. An agency should implement a set of procedures to allow employees to request an amendment be added to information they believe is inaccurate.

As with "legitimate educational interests" in student records, an agency should determine who within the agency has the need to know, or a "legitimate professional interest," in the contents of another staff member's record. The head of a department or program should be responsible for clearly specifying what is acceptable access. All possible day-to-day functions should be taken into consideration, as well as new ways to do business within the group. For example, a school principal who implements site-based management and encourages peer review practices may allow a teacher to see performance information about a fellow teacher. However, the access to, and use of, this information should be limited to well-specified circumstances; all staff within the group should be informed of these guidelines. No evaluation, complaint, or suggestion should be placed in a personnel file unless it is signed and dated by the person adding the information. In addition, the employee should be given an opportunity to inspect the information prior to its addition to the file. School districts may provide guidance and assistance in these matters.

An agency should determine who within the agency has the need to know, or a "legitimate professional interest," in the contents of another staff member's record.

B. Managing the Release Outside an Agency

As explained above, under the FOIA or open records law in most states, a "custodian" or "records official" is usually designated for each public agency that maintains public records. This custodian is responsible for keeping public records accessible to the public, and confidential information private. In some states, a state FOIA office performs this function. When employees are hired by a public agency, their personnel files begin to accumulate information in multiple locations, including the accounting and payroll system, the school principal's office, the department or program office, or the supervisor's file cabinet. Personnel in these different offices may have a legitimate need to have access to personal information about staff members in order to perform their professional functions. However, they must all understand that their functions do not include releasing any records, even if they believe the information would be considered public in their states. All information requests should be referred to the designated records official. This will prevent unintentional disclosure of information statutorily exempt from release, or the withholding of information considered public. To avoid confusion and maintain public trust, it is important that a public agency handle data requests consistently.

All information requests should be referred to the designated records official.

Another good strategy would be to work with the agency's attorney or legal office to update all agency staff on court rulings about disclosure and exemptions.

C. Evaluating a Request

The records official has discretionary power to release (or not) information that is neither required nor exempted from release by state laws. In doing this job, the two competing interests in the release must be considered. The following guidelines, modified from the NASSP Legal Memorandum, provide clear points to help custodians with such discretionary decisions. These include overall guiding principles to keep in mind, as well as a list of questions to analyze a specific request. Review Chapter 2 for important terms, definitions, and examples.

Use the following as your overall principles:

- Be familiar with federal and state statutes that apply to your state or school district. Keep current copies of the federal and your state's FOIAs and privacy acts on file.
- Do not rely on an exemption in the privacy act without thoroughly analyzing the competing interests under the appropriate FOIA.
- Remember the trusteeship concept and that, in competing interests, the balance tips toward disclosure.

- Remember that any identified exemption will be narrowly construed by the court, and that the burden will be on the agency to demonstrate that the information requested is indeed exempt from disclosure.
- Call your agency's attorney or legal staff if you are uncertain. However, you may first use the questions below to analyze the request. Provide whatever background information you have to help the attorney or legal staff fully understand the situation from different perspectives.
- Call your agency's attorney or legal staff to help you weigh the risks of a court appeal for non-disclosure. This is important if, after you complete your analysis, you have reason to believe that your refusal to disclose will be contested.

Use the following questions to analyze the situation:

1. **Is your agency considered a public agency by state law?**
2. **Is the information requested considered a public record as defined by state law?**
3. **Who is requesting the disclosure? What is the public interest in this request?**
4. **What is needed to meet this interest? Can it be met without releasing personal information?**
5. **What is the specific information requested? Is this information available from other public sources?**
6. **Is the requested information personally identifiable?**
7. **Is it possible to release the information without identifiers or other information that will identify the individual?**
8. **Is there a statutory exemption that applies to this request?**
9. **Is this information considered "confidential" and generally maintained in a personnel file? Does the information contain "intimate details" of a highly personal nature?**
10. **Is there a personal privacy interest? Is this interest substantial and identifiable, rather than merely speculative?**
11. **Would disclosure constitute a "clearly unwarranted invasion of personal privacy?" Would an ordinary person agree? Does this interest override that of the public purpose in knowing?**
12. **Is there a statutory duty not to release the information under state privacy acts? Do you have an affirmative duty not to release the information?**

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D. Documenting Requests and Releases

State statutes for reporting and notification requirements can be very specific and should be carefully reviewed. In some states, for example, when an agency receives a request for information and it "reasonably believes" that disclosure would constitute an "invasion of an employee's privacy," the agency is required to immediately notify the employee, in writing, of the request. The agency is not to release the records if an objection is made by the employee concerned, unless so ordered by the state FOIA authority.

The federal Privacy Act requires federal agencies to keep an accurate accounting of the date, nature, and purpose of disclosures of federal records to individuals or other agencies. The name and address of the person or agency to whom disclosure is made must also be noted, and the entire account must be maintained for at least five years after disclosure or for the life of the record, whichever is longer. Many state privacy laws also afford individuals a right to review their records, and the right to know who has had access to the information. It is therefore advisable for custodians of any public records to maintain a detailed log of any internal access and external release.

Agencies or schools should maintain detailed logs of access, retrieval, or release of records, including the names of persons retrieving records and the purposes of each release.

Agencies or schools should maintain detailed logs of access, retrieval, or release of records, including the names of persons retrieving records and the purposes of each release. They should also maintain a record of requests that have been denied or only partially filled, as well as a list of personnel authorized to have access to the files. Such information can be used for periodic reviews of agency confidentiality and data release policies.

CHAPTER 4

Collection and Maintenance of Staff Records

Overview

This chapter discusses the issues related to collecting and maintaining staff records in light of the competing interests of the public and the employee. Without a statutory exemption, information collected and maintained by a public agency is generally considered public and open. This chapter explains what types of staff data an agency may collect, and why. It suggests ways an agency may avoid having to unnecessarily maintain (and eventually release) certain types of personal information. The cycle of data collection, maintenance, and disposal is discussed, including licensure data.

Commonly Asked Questions

Q&A

Q. Should we collect any information not identified as "public records" in personnel files? If yes, how do we protect our employees' privacy?

A. You may collect any information you need to perform your job. In addition, although certain records might be considered public information, an unintentional disclosure may hurt an individual's employment, while an unauthorized access may affect the integrity of the records. Therefore, it is always best to protect the information you maintain as though it were *all* confidential, and allow access or disclosure only when release is authorized.

Q. How long should we maintain assessment or evaluation data on file?

A. State laws and statutes generally define how long assessment or evaluation information should be kept on file, as do local school board rules and policies on record-keeping and licensure.

Q. Who has access to an individual's background check? Is it a public record?

A. Some state licensure laws require the maintenance of detailed information obtained from a background check, including law enforcement records and even "rap sheets." Other states, however, only require documentation that a background check was conducted and that there was no prior record. Check with the laws or statutes that mandate the

Q&A

background investigation. They usually specify which parts of the investigation results must be kept on file and which, if any, are considered a public record.

Q. Who is responsible for the accuracy of the records?

A. Generally, the designated records official is considered responsible for the accuracy of the records. However, staff records are collected and maintained in multiple locations. Anyone who handles the files should therefore be trained to ensure the accuracy of the records, as well as to protect their privacy and integrity.

Guidelines

A. Types of Data to Collect

Agency or school officials may collect any information about a prospective or current employee, unless requesting such information violates federal and state laws such as the equal employment opportunity laws. You should familiarize yourself with these federal and state laws, as well as your agency's personnel guidelines.

Agency or school officials may collect any information about a prospective or current employee, unless requesting such information violates federal and state laws such as the equal employment opportunity laws.

State laws and board of education policies contain specific requirements for licensure or certification, as well as specific information that must be collected and maintained by the state education agency. Local education agencies maintain some of this information in their records. For example, a criminal background check may be required for all personnel working with children. Agency or school officials may be required to obtain "rap sheets" from the law enforcement agency, listing individual arrests and conviction records. State courts have generally considered this information to have a personal privacy interest.

If a piece of information is not specifically required by law, it is important to ask: "Why do I need this information?" If you are developing a licensure or certification database at the state level, the state licensure laws or board policies will outline the types of data required. Within this context, you may determine exactly how much information you will need to maintain in your system. If your state requires that a teacher pass a certain test to be certified, for example, you may decide to collect only the "pass/fail" indicator from the testing authority rather than the complete record with results and grades. If you receive teachers' college transcripts for licensure purposes, you may extract the required information and shred the copies (unless state law specifically requires that the transcripts be kept). In such ways, you can collect and maintain the information you need while still protecting the privacy interests of the teachers.

If a piece of information is not specifically required by law, it is important to ask: "Why do I need this information?"

On the other hand, the legislature and the public may demand more information relevant to the accountability of the education system they support. More specific and extensive types of data may be needed for your system to generate the information needed for planning, evaluation, and accountability purposes. The risks of collecting more confidential data such as performance and assessment information should thus be weighed against the benefits of a comprehensive database that can answer more questions. In other words, developing such a database should not be undertaken without careful and thorough planning.

The risks of collecting more confidential data should be weighed against the benefits of a comprehensive database that can answer more questions.

B. Data Maintenance

It is advisable to review the personnel record-keeping practices in your agency. Separate files with basic employment history information (including final actions and employment facts such as attendance and leaves) from files containing vast amounts of personal data and intimate details more likely to be exempt under your state's law.

A records official should be designated to maintain and protect the records of a department or program. These records should be kept in a locked, fireproof (preferably), and secure location where they cannot be inappropriately read, stolen, or changed. If the files are maintained electronically, adequate security procedures should be implemented to prevent data loss, unintentional damages, and unauthorized access. *Safeguarding Your Technology: Practical Guidelines for Electronic Education Information Security* provides sensible solutions that an agency or school may implement. It also contains procedures to authenticate and ensure the integrity of data transmitted electronically.

In addition, Section 4, Guideline A of *Protecting the Privacy of Student Records: Guidelines for Education Agencies* provides a detailed description of the management responsibilities of individual record maintenance. These principles are applicable in maintaining staff records as well.

C. Collecting and Using Unique Identifiers

A unique identifier is commonly assigned to each employee. If portions of a staff record are maintained in more than one site, the same unique identifier would be present in each file segment. According to the federal Tax Reform Act of 1976, an agency or school may require a social security number only to establish the identity of any person affected by a tax law or general public assistance law. It may also request, but not require, volunteers to disclose their social security number.

The federal Privacy Act generally prohibits government agencies from collecting and using social security numbers (SSN), except as authorized by federal law or by disclosure

An agency or school requesting an SSN should provide a written notice indicating whether disclosure is mandatory and by what authority. The notice should also state for what purpose(s) the numbers are being requested.

practices adopted at the federal, state, or local level prior to 1975. The law also prohibits agencies from denying any right, privilege, or benefit to individuals who refuse to disclose their SSN. An agency or school requesting an SSN should provide a written notice indicating whether disclosure is mandatory and by what authority. The notice should also state for what purpose(s) the numbers are being requested.

Many state privacy acts stipulate the use of SSNs; in such cases, the numbers may be under statutory exemption. Records officials should be familiar with the legal requirements and local practices regarding the use of SSNs.

D. Adding New Information to Records

Employee records are not always confined to the personnel manager's system. Segments might be maintained in multiple locations, such as a licensure and certification database, a supervisor's cabinet, a payroll system, or the law enforcement unit. Preventing unauthorized access will not only protect an employee's privacy, but also ensure the integrity of the information. The records official should designate a records manager to handle all internal access to records maintained in their agency's systems. The manager would be responsible for authenticating, reviewing, and approving all additions to, and deletions from, individual records.

The records official should designate a records manager to handle all internal access to records maintained in their agency's systems.

E. Licensure and Certification Data

Maintaining licensure and certification records is a unique function at the state level that is governed by the state licensure or certification laws. These records may be regionalized; they are usually maintained in a separate, off-site location by the certification or licensing authority. In addition to general background information that can also be found in a personnel file (e.g., race/ethnicity, address, academic and employment history), a state licensure database may include a wealth of other information such as tests and assessment results, investigation history, hearings held, revocation of a license, and even criminal records.

Agency or school officials should examine their state's licensing or certification laws to ascertain which data are subject to statutory release upon request, and which are protected from release by specific statutory exemptions.

Agency or school officials should examine their state's licensing or certification laws to ascertain which data are subject to statutory release upon request, and which are protected from release by specific statutory exemptions. Many state licensure and certification officials have worked with their state legislatures to provide statutory exemptions for at least part of the data they maintain. In New Hampshire, for example, teacher certification records maintained by the state education agency are statutorily exempted. Only information about an individual's certification status is subject to mandatory release upon request.

F. Disposal of Data

State laws usually specify schedules for document retention. For example, in South Carolina, teacher register and certification records are kept permanently, while personnel applications files are kept for two years and may be destroyed five years after termination. In Florida, personally identifiable staff records must be kept for five years, or until applicable federal or state audit functions have been completed.

If not already specified in state law and regulations, agency policies should be established to determine how long each type of data will be maintained in the staff records, and how often data will be updated. Records developed for the evaluation of state or federal education programs should be destroyed when no longer required. Any personally identifiable information pulled from staff records for research purposes should be destroyed after the project is completed. Paper records should be shredded before disposal, and electronic files should be erased from the system. Procedures for backing up and properly disposing of electronic files are discussed in *Safeguarding Your Technology: Practical Guidelines for Electronic Education Information Security.*

State laws usually specify schedules for document retention.

Glossary

Agency or School. Throughout this document, *agency* or *school* refers to the entity that collects, maintains, uses, and releases information from staff records. This entity may be a state education agency, school district, public school, or an intermediate education unit.

Confidentiality and Privacy. In this guide, *confidentiality* refers to your obligation not to disclose or transmit information to unauthorized parties. *Privacy* is a uniquely personal right that refers to an individual's freedom from intrusion. Protecting privacy means ensuring that confidential information about individuals is not disclosed without their consent.

Custodian (see Records Official)

Disclosure or Release. The use of *disclosure* includes permitting access to, revealing, releasing, transferring, disseminating, or otherwise communicating all or part of an individual record orally, in writing, electronically, or by any other means to any person or entity. The terms *disclosure* and *release* are used interchangeably in this document.

Discretionary Release. If a record is not restricted but no laws require its release, agency or school officials may decide, at their *discretion* to act either way. However, the courts reserve the right to make the ultimate decision regarding the release of a requested record.

Mandatory or Statutory Release. If a record is subject to *mandatory* or *statutory* release, the record is considered "open" and should be released upon request. Such release would be mandated by federal or state laws and statutes.

Personally Identifiable Information. This document discusses the issues related to the release of *individually* or *personally identifiable information* about a staff member. Generally, release of aggregate (non-personally identifiable) information is not a privacy issue unless the information unintentionally discloses the identity of a single person. A detailed description of when information is considered personally identifiable can be found in Section 6 of *Protecting the Privacy of Student Records: Guidelines for Education Agencies*.

Public Agency. All states have a legal definition of a public agency. For the purposes of this guide, a *public agency* is a publicly funded entity according to the laws of the state. Since the public school system is funded by public funds, all public schools, districts, and state education agencies are considered *public agencies*. Issues discussed here are relevant to the public school systems providing education and services from pre-kindergarten to high school, as well as alternative, adult, and community education programs.

Public Record. Throughout this document, a *public record* is used to mean a record or file subject to public inspection under the state's FOIA or open records law. State laws have different definitions of "public records" (see Chapter 2).

Records Official (Custodian). Most state FOIAs require that each agency designate a "custodian" of agency records, to whom requests for disclosure are made. For the purpose of this document, *records official* is used as a generic term referring to this custodian, or person designated by the state or local education agency, department or program head, or a school principal to have the management and operational responsibilities for staff records maintenance.

Staff Record. As used in this document, a *staff record* is a compilation of records, files, documents, and other materials containing information directly related to an employee of a school, district, or state education agency. The term *staff* in this document includes professional and support staff; licensed/certificated and non-licensed/certificated personnel; permanent, temporary, and contracted employees; as well as salaried and non-salaried workers (volunteers). Also called a *personnel record*, a staff record typically contains personal background information about an employee's residence, past and current employment, academic training, assignment and performance, as well as medical and other types of insurance. Portions of a staff record may be located in the school principal's office; the agency's human resources department; a supervisor's office; or a program office, such as the licensure office at the state education agency.

Statutory Exemption. If an official is subject to a *statutory* duty not to release a piece of information, the information is considered confidential and should not be released. The piece of information or record is considered a *statutory exemption*. Such protection of the record would be mandated by federal or state laws and statutes.

Notes

[1] This brochure can be downloaded from the web site of the National Center for Education Statistics at http:nces.ed.gov. The publication number for the English version is: 97859, the Spanish version is: 97949. Telephone orders can be taken at 1-877-433-7827.

[2] This publication can be downloaded from the web site of the National Center for Education Statistics at http:nces.ed.gov. The publication number is: 97527. Telephone orders can be taken at 1-877-433-7827.

[3] This publication can be downloaded from the web site of the National Center for Education Statistics, at http:nces.ed.gov. The publication number is: 98297. Telephone orders can be taken at 1-877-433-7827.

[4] National Association of Secondary School Principals, *School Personnel Records: Confidentiality vs. The Public Right to Know*. Reston, Virginia, May 1989. This memorandum is printed from the Educational Research Information Center (ERIC) database: document number ED309569.

[5] Text of the law, 5 U.S.C. §522, as amended by Public Law No. 104-231, 110 Stat. 3048 can be downloaded from the web site of the U.S. Department of Justice at: http:www.usdoj.gov.

[6] Full copy of the law may be downloaded from the web site of the U.S. Department of Justice at http:www.usdoj.gov.

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